No. 83-1254

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD W. VELDE, et al.,

Petitioners,

—v.—

NATIONAL BLACK POLICE ASSOCIATION, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

Respondents -- the National Black Police Association and twelve discriminated-against individuals -- alleged in their complaint that petitioners willfully and maliciously refused to enforce any of their constitutional and statutory civil rights enforcement obligations, including petitioners' constitutional and statutory obligation to terminate federal grants to state and local police departments which petitioners knew were practicing discrimination. The questions sought to be presented to this Court are:

1. Did respondents state a claim for relief under the Fifth Amendment by alleging that petitioners "willingfully and maliciously" provided funding to grantees known to be discriminatory?

2. Are petitioners, who are alleged to have "willfully and maliciously" provided funding to grantees known to be dis-

criminatory, entitled to qualified immunity from any liability for damages on the ground that their alleged conduct did not violate any clearly established constitutional rights?

3. Are petitioners, who adopted and followed a policy of never terminating funding to grantees known to be discriminatory, entitled to absolute immunity on the ground that they performed discretionary functions analogous to those of a prosecutor?

4. May respondents seek damages for petitioners' across-the-board refusal to carry out their mandatory enforcement obligations under § 518(c)(2) of the Crime Control Act, as amended in 1973?

5. Do respondents, who alleged injury and causation/redressability, have Art. III standing to mantain this lawsuit?

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STATEMENT

Most of petitioners' mischaracterizations of respondents' claims, and of the prior proceedings in this case, were addressed when this case was previously before the Court. See Br. for Resps. at 1-10, Velde v. National Black Police Association, 458 U.S. 591 (1982) (No. 80-1074). A few additional comments nonetheless are in order here.

First, respondents nowhere alleged in their complaint "that petitioners took many steps to enforce [petitioners'] civil rights obligations." Cert. Pet. at 7. To the contrary, respondents repeatedly alleged in their complaint that petitioners willfully and maliciously refused to enforce any of their constitutional and statutory civil rights enforcement obligations including their constitutional and statutory obligation to terminate federal grants to state and

local police departments which petitioners knew were practicing discrimination. J.A. 11-45.[1/]

Second, respondents' allegations were duplicated by the findings of subsequent investigations conducted by the Executive Branch and by Congress.[2/] And, despite the trial court's denial to respondents of all discovery in this case, J.A. 1-3, 341-45, respondents' allegations nevertheless were

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1 "J.A." refers to the Joint Appendix filed when this case was previously before this Court, see Velde v. National Black Police Ass'n, 458 U.S. 591 (1982) (No. 80-1074).

2. The congressional findings documenting petitioners' blatant disregard of their civil rights enforcement obligations are summarized in the Br. for Resps. at 1-10, 1a-24a, Velde v. National Black Police Ass'n, 458 U.S. 591 (1982) (No. 80-1074).

Findings issued by the Civil Rights Commission two months after this lawsuit was filed also closely paralleled the allegations of the complaint. U. S. Comm'n on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT -- 1974 (Vol. VI, To Extend Federal Financial Assistance) 271-393, 773-77 (1975). The Commission's report was filed with the district court as an exhibit to respondents' motion for preliminary injunction, and relevant portions of the report were reprinted in the Appendix filed in the court of appeals, C.A. App. 481-623.

well supported by documents in the record which had been obtained from petitioners under the Freedom of Information Act prior to the filing of this lawsuit.[3/]

Finally, although the proceedings in this case admittedly have been lengthy, the delay has harmed not petitioners but respondents. Moreover, respondents submit that protraction has been caused by petitioners' repeated raising of new and alternative, insubstantial arguments which never were ruled on by the trial court.

REASONS WHY THE WRIT SHOULD BE DENIED

Several of the questions presented by petitioners here were presented to this Court two Terms ago in this case, Velde v. National

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3. Many of these FOIA documents were filed by respondents in in support of their motion for a preliminary injunction and writ of mandamus, J.A. 46-233, and in support of respondents' opposition to petitioners' motion to dismiss or for summary judgment, J.A. 340-494.

Black Police Association, 458 U.S. 591 (1982) (No. 80-1074) (Powell and Stevens, JJ., not participating), see Cert. Pet. App. 34a. The questions did not warrant rulings from this Court, and the case instead was remanded on the issue of qualified immunity "for further consideration in light of Harlow v. Fitzgerald, 457 U.S. 800 (1982)." Id.

Several of the other questions presented by petitioners, now as before, were never ruled on by the trial court and were not decided by the court of appeals in either its initial decision or in its remand decision.

Especially in light of this procedural posture, there are no substantial questions which merit plenary review.

1. Petitioners seek review of a question never addressed by any of the lower courts in this case: whether the complaint states a claim under the Fifth Amendment.

Petitioners argue that respondents never alleged "that petitioners acted with discriminatory intent" and that the complaint accordingly "does not state a claim under the Constitution." Cert. Pet. at 12.

a. This question was never addressed by the trial court in this case, nor was it addressed by the court of appeals in either of its two decisions below. As summarized by the court of appeals in its remand decision:

> The district court has not yet ruled whether [respondents'] complaint states a claim upon which relief can be granted. We did not address this issue in our first opinion, and the issue has not been briefed for us. We therefore do not view the issue as properly presented for our decision in the present posture of this case.

Cert. Pet. App. 7a note 27. For the same reasons, the issue is not now properly presented to this Court.[4/]

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4. Petitioners' insistence upon seeking review of a question never decided below belies their purported [cont'd. on next pg]

b. The question also is improperly presented as it is premised upon petitioners' extensive mischaracterization of the explicit language of the complaint, which alleges that petitioners' unconstitutional actions were "willful and malicious." J.A. 44. The complaint not only contains an explicit elaboration of the manner in which petitioners were alleged to have been "acting unconstitutionally and in excess of their authority," see J.A. 41-43, but also includes repeated references to petitioners' knowing refusals to alter their discriminatory policies and practices, see, e.g., J.A. 21-41. Respondents, through their unavailing contacts with petitioners, had every reason to believe that petitioners' unconstitutional

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concern about the length of the proceedings in this case, in which petitioners have succeeded in blocking all proceedings in the trial court for more than eight years. "[I]n any event, [the] question [now raised] should be decided in the first instance by the" courts below. Escambia County v. McMillian, No. 82-1295, slip op. at 4 (U.S. March 27, 1984) (per curiam).

conduct was "willful and malicious," and so they alleged. J.A. 44. No greater specificity in pleading is required. Cf. Gomez v. Toledo, 446 U.S. 635 (1980).

2. Petitioners ask this Court to review the question which the court of appeals decided on remand in light of Harlow v. Fitzgerald, 457 U.S. 800 (1982): whether petitioners had "'clearly established' . . . constitutional duties to terminate federal funds to local law enforcement agencies allegedly known to be discriminating unlawfully on the basis of race and sex." Cert. Pet. App. 2a. Based upon a long line of this Court's decisions dating from 1958, the court of appeals recognized that "it is a clearly established principle of constitutional law that the federal government may not fund local agencies known to be unconstitutionally discriminating," Cert. Pet. App. 20a, and

held that petitioners accordingly were not entitled to qualified immunity on summary judgment under Harlow. Petitioners, who do not directly dispute that the governing constitutional principles had been clearly established, have presented no substantial issue here.

a. In Harlow, this Court held that "government officials performing discretionary functions" are not entitled to qualified immunity where they are alleged to violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. There can be no question here that clearly established constitutional principles bar government officials not only from engaging in direct discrimination but also from providing government "support" to discrimination "through any arrangement, management, funds or property." Cooper v. Aaron, 358

U.S. 1, 19 (1958). As Chief Justice Burger unequivocally reiterated for the unanimous Court in Norwood v. Harrison, 413 U.S. 455, 467 (1973), a government agency's "constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." See also Gilmore v. Montgomery, 417 U.S. 556 (1974); Coit v. Green, 404 U.S. 997 (1971), sum. aff'g sub nom Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971). Petitioners, who not only served as law enforcement officials but also were lawyers, do not seriously dispute that the foregoing decisions clearly established petitioners' constitutional obligations. Cert. Pet. at 17-19. The court of appeals' proper application of these decisions through the objective test in Harlow is unassailable.[5/]

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5. Although petitioners complain that the court of appeals' decision does not provide adequate guidance to federal officials who seek to avoid liability, [cont'd. on next pg]

b. Qualified immunity is also unavailable to petitioners as they did not and cannot meet the threshold Harlow requirement of exercising "discretionary functions." 457 U.S. at 818. As the court of appeals recognized in its first decision below, in view of petitioners' mandatory statutory duties under § 518(c)(2) of the Crime Control Act, 42 U.S.C. § 3766(c)(2) (Supp. V 1974), see infra at 11-13, petitioners had "virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding to discriminatory recipients." Cert. Pet. App. 39a. In fact, the "mandatory language" of the statute, when

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Cert. Pet. at 17-19, we fail to understand how federal enforcement officials can mistake the meaning of the court of appeals' decision or of the decisions of this Court in the context of this case. Petitioners, after all, were alleged to have willfully and maliciously provided funding to known discriminators, and petitioners' own discriminatory actions were well documented by findings made by Congress and by the U.S. Commission on Civil Rights, see supra at 2 note 2, as well as through FOIA materials in the record of this case, see supra at 3 note 3.

read in conjunction with petitioners' "constitutional . . . duty not to allow federal funds to be used in a discriminatory manner by recipients, takes [petitioners'] civil rights enforcement duties outside the realm of discretion." Id. at 40a note 15; see also id. at 13a-20a. This lack of discretion also takes petitioners outside of the realm of qualified immunity under Harlow.

3. Ignoring their nondiscretionary statutory mandate, petitioners urge this Court to review yet again whether all of the petitioners should have been accorded absolute immunity based on this Court's allowance of prosecutorial immunity in Butz v. Economou, 438 U.S. 478, 515 (1978), to those specific agency officials who enjoy "broad discretion in deciding whether a [civil penalty] proceeding should be brought and what sanctions should be sought." Two Terms ago in this case, this Court declined to

adopt petitioners' identical argument and thereby declined to disturb the court of appeals' rejection of that argument. Cert. Pet. App. 34a. No substantial question is presented here.

a. The nondiscretionary enforcement obligations imposed upon petitioners by their governing statute, § 518(c)(2) of the Crime Control Act, precluded petitioners from claiming prosecutorial immunity. In enacting § 518(c)(2), Congress used language quite different from that in other statutes such as Title VI of the Civil Rights Act of 1964, and instead mandated the use of fund termination proceedings against grantees not in compliance with the statute's nondiscrimination requirements.[6/] By specifying that such pro-

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6. As the court of appeals explained: "The broad discretion over enforcement methods provided by Title VI is in sharp contrast to the mandatory language of the Crime Control Act." Cert. Pet. App. 13a.

The mandatory language of the Crime Control Act and the circumstances which compelled Congress to impose this uniquely stringent mandate are set forth at considerable length in the court of appeals' remand [cont'd. on next pg]

ceedings must be brought against grantees found to be discriminatory, Congress expressly denied petitioners any "broad discretion in deciding whether a proceeding should be brought." 438 U.S. at 515. Petitioners similarly had no discretion to decide "what [civil penalty] sanctions should be sought," id., since § 509 of their statute provided only for the termination of the "federal payments" which the noncomplying grantees were not eligible for in the first place. As the court of appeals succinctly concluded in direct response to petitioners' argument: "The purpose of shielding discretionary prosecutorial decisions from fears of civil liability has no place where, as here, agency officials lack discretion." Cert. Pet. App. 39a; see also id. at 13a-20a.

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decision, Cert. Pet. App. 13a-20a, and in its initial decision, id. at 38a-40a. See also Br. for Resps. at 1-10, 16-29, 1a-24a, Velde v. National Black Police Ass'n, 458 U.S. 591 (1982) (No. 80-1074).

b. The record here also bars petitioners' claim of prosecutorial immunity since the record establishes both that petitioners denied themselves all discretion and that they in fact never exercised any prosecutorial functions. First, and directly contrary to their statutory mandate requiring administrative action prior to pursuit of judicial relief, petitioners strictly adhered to an administrative regulation interpreted by petitioner Richard Velde to "require LEAA to pursue court action and not administrative action to resolve matters of employment discrimination." J.A. 90. Second, in their pre-Butz affidavits filed in the trial court, none of the petitioners anywhere claimed to have any prosecutorial functions much less either the authority or the responsibility for refusing to initiate administrative fund termintion proceedings. J.A. 236-64. Instead, petitioners uniformly described themselves only as administrators. Id.

Under Butz they accordingly are entitled to no more than qualified immunity.

4. Petitioners next ask this Court to review another question now raised for the first time in this litigation: "whether respondents may pursue a personal damages remedy against petitioners on the basis of the Crime Control Act alone." Cert. Pet. at 22-23.

a. Since petitioners never moved to dismiss respondents' complaint on this ground, J.A. 234-35, and since this question accordingly was never addressed by the trial court or by the court of appeals in either of its decisions, petitioners in effect seek an advisory opinion from this Court on a matter which has never been properly placed in issue. If petitioners truly desire a ruling on respondents' statutory cause of action, petitioners on remand may file an appropriate motion to dismiss with the trial court. The

issue simply is not properly presented here in the posture of this case. See supra at 5-6 & note 4.

b. Apart from their request for review of a question never before raised in this case, petitioners provide no legal support for their view that respondents lack a cause of action under the Crime Control Act. To the contrary, respondents fully satisfy each of the four criteria in Cort v. Ash, 422 U.S. 66, 78 (1975). Additionally, since Congress subsequently recognized the pendency of this lawsuit, approved of such actions, and preserved the implied right of action[7] when it amended § 518(c) of the Crime Control Act in 1976, respondents' cause of action is confirmed by the "contemporary legal context" in which Congress legislated. Cannon v. University of Chicago,

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7. See H.R. Rep. No. 155, 94th Cong., 2d Sess. 11, 27 (1976); see also LEAA Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 491-516 (1976).

441 U.S. 677, 698-99 (1979); see generally Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-88 (1982).

5. Petitioners lastly seek review of the holding below that respondents have Art. III standing to maintain this action. Contrary to petitioners' assertion, Cert. Pet. at 9 note 8, there was no disagrement among the appellate judges below that the allegations in the complaint were sufficient to establish respondents' standing, Cert. Pet. App. 2a note 3, 40a note 16, 42a-48a. Additionally, although respondents' standing was previously at issue before this Court -- and comprised the bulk of oral argument[8/] -- the court of appeals' initial decision upholding respondents' standing was not disturbed by this Court. Cert. Pet. App. 34a. Peti-

8. See Oral Arg. Trans. 4-8, 18, 26-30, 34-35, 37, 41, 43-44.

tioners advance no persuasive justifications for revisiting the question now.

a. As consistently alleged in this case, respondents were injured by petitioners' refusals to carry out their constitutional and statutory civil rights obligations and by petitioners' consequent funding of grantees which were also discriminating against respondents. See J.A. 18-41. As in Norwood v. Harrison, 413 U.S. 455 (1973), the alleged violations by petitioners caused the injuries which respondents assert; and, similarly, the relief sought by respondents (injunctive relief and damages) would remedy and compensate for the injuries caused by petitioners' transgressions. Respondents here -- in a position no different from that of the plaintiffs in Norwood and in Gilmore v. Montgomery, 417 U.S. 556 (1974) -- more than adequately alleged the injury and causation/redressability necessary to establish

their standing. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978).

b. Even under petitioners' mistaken view of this case (as one in which respondents' only injury was caused not by petitioners' own Norwood violations but instead solely by the discrimination practiced by petitioners' grantees, Cert. Pet. at 23-25), respondents have also met the injury and causation/redressability requirements of Art. III. As Judge Tamm stated in his separate opinion when the court of appeals first considered this case, Cert. Pet. App. 42a-48a, respondents' complaint was adequate to survive petitioners' motion to dismiss since respondents had to be allowed discovery to show that the actual or even threatened termination of funding to petitioners' discriminatory grantees would effect nondiscriminatory behavior by the grantees. Even

without discovery in this case, not only is the power of fund termination well documented, see Br. for Resps. at 40-42, Velde v. National Black Police Association, 458 U.S. 591 (1982) (No. 80-1074), but the actual existence here of injury and causation/redressability is in fact established in the record in this case with regard to petitioner Joel Michelle Schumacher.[9/] The standing of

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9. Respondent Schumacher, who had been denied employment by the New Orleans Police Department because she was a female, alleged in the complaint that she had "been discriminated against by the [petitioners] through their provision of and refusal to terminate their LEAA funding to the New Orleans Police Department, despite the [petitioners'] knowledge that the Department has discriminatorily denied employment to [respondent] Schumacher." J.A. 34.

At the time the complaint was filed -- in September, 1975 -- petitioners had never invoked or even threatened to invoke the mandatory fund termination proceedings against discriminatory grantees. J.A. 21. Subsequent to the filing of this lawsuit, however, petitioners began to change their posture of nonenforcement. One such instance, revealed in the record in this case, establishes respondent Schumacher's standing under petitioners' own narrow theory.

Subsequent to the filing of this lawsuit, and substantially after petitioners had found the New Orleans Police Department to be illegally engaged in sex discrimination, petitioner Herbert Rice advised [cont'd. on next pg]

one respondent thus having been affirmatively established beyond peradventure, respondents' complaint may not now be dismissed. Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160 (1981).

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the Superintendent of Police that without the immediate elimination of the discrimination petitioners "will be forced to initiate administrative proceedings to terminate funding to your Department." Within weeks, the Superintendent of Police responded to petitioner Rice that the discrimination was being eliminated solely because of the proposed "cancellation of all LEAA fundings to this Department," and in fact "under duress, namely, the threatened cancellation of LEAA fundings to this Department." See Attachments N.O.-9 and N.O.-10 appended to the Statement of Reasons and Appendix filed in the district court in support of Defendants' Motion to Dismiss or for Summary Judgment.

CONCLUSION

No substantial issues warranting further briefing or oral argument have been raised by petitioners. The writ of certiorari should be denied.

Dated: April 6, 1984

Respectfully submitted,

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